Squire, Sanders & Dempsey
L.L.P.
Counsellors at Law
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044-0407

Telephone (202) 626-6600
Cable Squire DC
Telecopier (202) 626-6780

Direct Dial Number
(202) 626-6624

November 24, 1998

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street N.W., Room 814
Washington, D.C. 20554

Re: CC Docket No. 96-61 -- CMRS Rate Integration

Dear Chairman Kennard:

On behalf of the State of Hawaii,[1] I am writing to respond to the *ex parte* letter recently submitted by Bell Atlantic Mobile ("BAM") concerning the application of the rate integration requirements of Section 254(g) of the Communications Act to Commercial Mobile Radio Service ("CMRS") providers.[2] In the letter, BAM suggests that Section 254(g) does not apply to CMRS providers and, in the alternative, argues that the Commission should forbear from requiring CMRS providers to integrate the rates for the interstate, interexchange services that they provide to subscribers.

As explained below, BAM's claim that Section 254(g) does not apply to CMRS is at odds with the plain language of the statute and has been repeatedly rejected by the Commission. Moreover, Bell Atlantic's forbearance request is, at its core, nothing more than a request for a license to discriminate and thus runs directly counter to the universal service policies embodied in the Telecommunications Act of 1996 (the "1996 Act") and the statutory forbearance criteria under Section 10 of the Communications Act. The State is convinced that if Congress had intended to exempt CMRS providers from Section 254(g)'s rate integration requirements, it

[1] This letter is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] *See* Letter from S. Mark Tuller, General Counsel and Secretary, Bell Atlantic Mobile, to William E. Kennard, Chairman, Federal Communications Commission (Nov. 10, 1998) ("*BAM Letter*").

would have done so on the face of the statute. Congress plainly did no such thing and it would be inappropriate to abandon rate integration so soon after the enactment of Section 254(g).

Background. BAM's unfortunate characterization of rate integration as "pure economic interventionism" that "injures consumers" reflects a fundamental misunderstanding of the purpose of this important policy.[3] Contrary to Bell Atlantic, both the Commission and Congress have recognized that rate integration is grounded in sound principles of universal service and provides substantial benefits to consumers, particularly those in offshore points such as Hawaii. Although Hawaii was admitted to Statehood in 1959, for many years mainland carriers classified Hawaii (and other points) as an international point and established "separate" rate structures for services to the State. As a result, the rates for services to and from Hawaii were higher than rates for comparable services offered on the Mainland. This situation adversely affected the State's citizens, its economy, and, ultimately, the Nation as a whole.

To remedy this historical pattern of discrimination, the Commission adopted two distinct policies. First, *rate integration* requires that a carrier serving remote locations employ the same rate structure or rate scheme for those locations that it employs for non-remote locations. Rooted in Section 202(a) of the Act, this policy prohibits unreasonable discrimination for like services. Second, *geographic rate averaging* requires carriers to offer the same services, at the same rates, for the same distance, regardless of the location of the terminal points. This policy ensures that no person is deprived of telecommunications service at reasonable rates simply because of the high costs associated with serving the user's location.

In adopting the Telecommunications Act of 1996, Congress recognized the importance of these policies to the broader national objective of promoting universal service. Accordingly, Congress codified and expanded the Commission's rate integration and geographic rate averaging policies in Section 254(g) of the 1996 Act.

Section 254(g)'s Rate Integration Requirements Apply to CMRS. BAM's claim that there is "no basis in law or policy" to apply rate integration to CMRS is without merit.[4] Section 254(g) of the Communications Act states that "a provider of interstate interexchange services shall provide such services to its subscribers at rates no higher than the rates charged to its subscribers in any other State."[5] Based on this plain language, the Commission has repeatedly determined that Congress intended rate integration to apply to *all* providers of interexchange

[3] *Id.* at 1.

[4] *Id.*

[5] 47 U.S.C. § 254(g).

services – including CMRS providers – "with no exceptions enumerated."[6] Had Congress intended otherwise, it clearly would have exempted CMRS providers from Section 254(g) just as it did with respect to many other provisions of the 1996 Act.[7] But Congress chose not to do so. Consistent with the plain language of the Act and the intent of Congress, the Commission should – once again – confirm that rate integration applies to all interexchange service providers, including CMRS providers.

Forbearance from Section 254(g) Would be Inappropriate. BAM next suggests that the growth of competition and the introduction of so-called "wide area" calling plans provides "an independent basis for forbearing" from applying Section 254(g) to CMRS providers.[8] This is plainly incorrect. Under Section 10 of the Act, the Commission must find for specific markets and services that forbearance: (1) will not jeopardize the reasonableness and *non-discriminatory* nature of carriers' rates and practices; (2) will not undermine consumer protection; and (3) is otherwise in the public interest.[9] In light of these statutory criteria, the Commission has expressly determined that broad claims about competition – such as those made here by BAM – are not sufficient to justify forbearance from Section 254(g)'s rate integration and geographic averaging requirements. In particular, the Commission has explained:

> We are not persuaded that we must forbear from requiring carriers to comply with rate integration, either generally or in *competitive conditions*, for the same reasons discussed with respect to geographic rate averaging. Our rate integration policy has integrated offshore points into the domestic interstate, interexchange rate structure so that the benefits of growing

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[6] *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, FCC 97-357, at ¶ 19 (rel. Oct. 3, 1997) ("*Stay Order*"); *see Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 9564, 9589 (1996) ("*First Report and Order*"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, FCC 97-269, at ¶ 18 (rel. July 30, 1997) ("*Reconsideration Order*").

[7] For example, the 1996 Act expressly: excludes CMRS from the definition of local exchange carrier; classified CMRS as one of the "incidental interLATA services that the Bell companies could offer without prior Commission approval; excluded CMRS from the definition of "basic telephone service", thereby permitting the BOCs to offer electronic publishing over their CMRS networks; permitted the BOCs to market and sell CMRS in conjunction with other services. *See* 47 U.S.C. §§ 153(26), 271(g)(3), 274(i)(2)(B).

[8] *BAM Letter* at 2.

[9] *See* 47 U.S.C. § 160(a).

> competition for interstate interexchange telecommunications services . . . are available *throughout our nation.*[10]

Like the other CMRS petitioners seeking forbearance, BAM has failed to describe how abandoning Section 254(g)'s rate integration requirements – and, in effect, granting CMRS providers a license to adopt discriminatory rate structures – would advance consumer protection or ensure the reasonableness and nondiscriminatory nature of CMRS providers' rates for interstate, interexchange services.

Nor has BAM established a sufficient factual predicate to carry its burden of demonstrating that forbearance is appropriate. Without question, the State agrees with BAM that the introduction of rate- integrated, nationwide calling plans – such as AT&T's "One Rate" plan, and Sprint's "Dime Anytime" plan – is a positive development.[11] However, only a handful of truly integrated, wide-area digital plans that use the same rate structure for *all* interstate, interexchange calls have been introduced.[12] And these plans are targeted primarily at higher-volume users who travel frequently and spend upwards of $90 per month on mobile service. Thus, notwithstanding BAM's claims that "wireless long distance has *begun* to disappear as a concept"[13] and that "wireless plans . . . are increasingly moving away from rate bands"[14], the fact remains that the many mobile customers do not – and likely will not for the foreseeable future – take service under integrated, flat-rate plans. Congress enacted Section 254(g) precisely to ensure that these consumers would also realize the benefits of rate integration.

Until the CMRS industry actually shifts to the flat-rate, distance-insensitive pricing paradigm described by BAM, abandoning Section 254(g)'s rate integration requirement for CMRS would likely harm consumers. CMRS offerings are becoming real substitutes for landline interexchange services. In more remote areas, these services bring critically needed competition to offshore consumers. The forbearance requested by BAM would, in effect, grant CMRS providers a license to adopt discriminatory rate structures for remote or offshore points

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[10] *First Report & Order*, 11 FCC Rcd at 9583, 9588 (emphasis added).

[11] *BAM Letter*, Affidavit at 6.

[12] Some other wide area calling plans appear to use a "flat" rate structure for interstate, interexchange calls within a specific service area and a different rate structure for interstate, interexchange calls for calls to points outside of the service area. The compatibility of these plans with the rate integration *and* geographic averaging requirements of Section 254(g) of the Act is debatable.

[13] *BAM Letter* at 4.

[14] *Id., Affidavit* at 6.

and would likely produce unreasonably high rates for some subscribers. This type of rate disparity is precisely the result that Congress enacted Section 254(g) to protect consumers from.

BAM has Overstated the Differences Between CMRS and Wireline Interexchange Services. BAM also argues that CMRS does not fit within the local exchange/interexchange framework used for wireline services and, on this basis, suggests that CMRS should be exempt from Section 254(g)'s rate integration requirements.[15] Once again, the thrust of BAM's argument is nothing new. The Commission addressed a similar issue in the *Local Competition* proceeding, where – for the very same reason – BAM argued that CMRS should be exempt from Section 251(b)'s reciprocal competition requirements. [16] Just as it did in the *Local Competition Order*, the Commission should reject BAM's attempt to avoid its statutory obligations based on the nature of CMRS.

To be sure, there are differences between CMRS and wireline interexchange services. As noted by BAM, CMRS providers have different licensed service areas. As also noted by BAM, CMRS and wireline interexchange services are subject to different competitive pressures (with the wireline interexchange market generally being more competitive). However, Bell Atlantic's suggestion that the concepts of local exchange and interexchange are completely alien to CMRS overstates the difference between wireless and wireline services.

Like wireline interexchange calls, most long distance CMRS calls are completed using landline facilities, which can readily be classified as interexchange or local in nature. These calls typically travel a greater distance over landline facilities than radio facilities. Further, the Commission has recognized that CMRS providers, like their wireline counterparts, have the ability to distinguish between local and interexchange calls.[17] Finally, and perhaps most important, many CMRS plans distinguish between local and interexchange with respect to the rates charged to subscribers. For example, the Primeco plan held out by Bell Atlantic as an example of an integrated offering imposes a long distance charge of $.19 per minute on subscribers.[18] Notwithstanding BAM's claims about the unique structure of CMRS, it appears

[15] *BAM Letter, Affidavit* at 2, 3.

[16] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 16010 n.2456 (1996) (subsequent history omitted).

[17] In particular, the Commission decided that a CMRS call would be classified as "local" or "interexchange" based on (1) the location of the cell site where the call began; or (2) the point of interconnection between the LEC and CMRS system at the beginning of the call. *See id.*. at 16017; *see also Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, 18707-18 (1996).

[18] *See BAM Letter* at 4.

that Primeco is able to identify interexchange calls and integrate the rates charged to subscribers for such calls. There is every reason to believe that other CMRS providers can do the same. Indeed, for years wireline carriers have been required to integrate the rates for their interstate, interexchange services and the market in which they participate is characterized by vigorous competition.

Section 332(c) of the Communications Act has no Bearing on Section 254(g). Contrary to BAM's claims, Section 332(c) of the Communications Act – which gives the Commission authority to forbear from certain Title II regulation – has no bearing on the authority of the Commission to integrate CMRS rate structures under section 254(g). To begin with, Section 254(g) was adopted after Section 332(c) and, as discussed above, Congress chose to make no exception to rate integration requirement for CMRS. Moreover, as the Commission stated in the *CMRS Second Report and Order*, the primary intent of Congress in enacting Section 332(c) was, *consistent with the public interest*, to accord similar regulatory treatment to similar services.[19] Thus, Section 332(c) was not intended to completely deregulate CMRS rates at the federal level. To the contrary, Section 332(c) expressly *requires* the Commission to continue to regulate CMRS providers pursuant to Sections 201 (just and reasonable rates, interconnection obligations), 202 (unreasonable rate discrimination prohibited), and 208 (enforcement of violations through the complaint process) of the Communications Act. Section 254(g) shares with Sections 201 and 202 the common goal of ensuring that consumers do not pay unreasonably high or discriminatory rates

Although Section 332(c) gives the Commission authority to forbear from other Title II regulation of CMRS, forbearance would be inappropriate in this case. Like Section 10 of the Act, Section 332(c) only permits the Commission to forbear from Title II regulation if it determines that (1) enforcement is not necessary to ensure just, reasonable, and non-discriminatory rates; and (2) enforcement is not necessary to protect consumers; and (3) forbearance would be consistent with in the public interest.[20] Because forbearance from Section 254(g) would permit CMRS providers to adopt discriminatory rate structures, the Commission cannot forbear from this requirement under Section 332(c).

The State is Sensitive to the Concerns Expressed by the CMRS Industry. As explained above, the State believes that CMRS providers must integrate the rates for their interstate, interexchange services pursuant to Section 254(g) of the Act. At the same time, however, the State recognizes that application of rate integration to CMRS may require clarification of certain issues. For example, as it has noted previously, the State recognizes that the Commission may need to modify the definition of the term "affiliate" as it applies to CMRS

[19] *See Implementation of Sections 3(n) and 332 of the Communications* Act, 9 FCC Rcd 1411, 1418 (1991).

[20] 47 U.S.C. § 332(c)(1)(A).

providers. According to the CMRS petitioners, wireless providers often operate through complex partnership structures and, as a result, companies that are partners in one market may be competitors in other markets. Under the Commission's current definition of "affiliate," some of these CMRS companies could be required to integrate their rates even in markets where they compete against each other.[21] To avoid this unintended result, the State would not oppose modifying the definition of affiliate so that rate integration is not required across (1) multiple, competing parent companies that jointly control a CMRS provider; and (2) commonly-owned CMRS providers to the extent that they compete in the same geographic service area.[22] One possible approach would be to adopt a "control" test to determine when two CMRS providers are affiliated. Another approach would be to adopt a percentage ownership threshold to be used as a surrogate to determine when one CMRS provider is controlled by, and thus affiliated with, another provider.

The Commission also may need to clarify what CMRS calls should be treated as local and what calls should be classified as interexchange for purposes of rate integration. The State would not be opposed to using Major Trading Areas ("MTAs") as the dividing line between "local" and "interexchange" calls in the CMRS context. Support for this approach can be found in the Commission's use of MTAs to define local service areas in the CMRS context for purposes of reciprocal compensation under Section 251(b)(5) of the Act.[23] Under this classification scheme, calls within an MTA would be considered local and would not have to be rate integrated; calls outside of the MTA would be considered interexchange and would have to be rate integrated to the extent that they are interstate and the CMRS provider assessed a separate charge for the interstate portion of the call. Because MTAs are very large in size, this approach would give CMRS providers considerable flexibility with respect to the introduction of flat-rate, wide area calling plans.

Under no circumstances, however, should the Commission permit CMRS providers to adopt one rate structure for interstate, interexchange calls on the Mainland and a separate rate structure for calls to offshore points, such as Hawaii. This would return the State to the pattern of discrimination that it endured prior to the adoption of rate integration in 1976.

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[21] 47 C.F.R. § 32.9000.

[22] The State, however, is opposed to limiting affiliation to CMRS providers that are "identically owned by a single provider." If one CMRS provider is owned 94 percent by Company X and another CMRS provider is owned 85 percent by Company X, these two CMRS providers should be considered affiliates because they are commonly controlled by the same parent company. The Commission therefore should reaffirm that Section 254(g) requires rate integration across affiliates for all interexchange carriers, including CMRS carriers. To rule otherwise would allow companies "to avoid the Congressional mandate of integrated interexchange rates by using or creating multiple interexchange carrier subsidiaries, each serving a separate geographic area." *Reconsideration Order* at ¶ 15.

[23] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd at 16014.

Many of the issues raised in BAM's *ex parte* letter are addressed in greater detail in the State's *Opposition* to the petitions for reconsideration filed by the CMRS interests. Accordingly, the State is attaching a copy of its *Opposition* to this letter. For the reasons stated above, the State urges the Commission to deny the petitions for forbearance from Section 254(g)'s rate integration requirements filed by the CMRS interests.

Sincerely,

Herbert E. Marks, BJM

Herbert E. Marks
Brian J. McHugh

Telecommunications Counsel for the
State of Hawaii

Copy: Commissioner Furchtgott-Roth
Commissioner Ness
Commissioner Powell
Commissioner Tristani
Lawrence E. Strickling
Jane E. Jackson
Kris A. Monteith
Douglas L. Slotten
Jeanine Poltronieri
Peter Wolfe
Magalie Roman Salas

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

OPPOSITION OF THE STATE OF HAWAII

Kathryn Matayoshi,
Director

Charles W. Totto,
Executive Director

Division of Consumer Advocacy

DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

250 South King Street
Honolulu, Hawaii 96813

(808) 586-2770

STATE OF HAWAII

Herbert E. Marks
James M. Fink
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Its Attorneys

October 31, 1997

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SUMMARY

The Commission's July 30, 1997 Reconsideration Order correctly held that the rate integration requirement of Section 254(g) of the Communications Act applies to Commercial Mobile Radio Service ("CMRS") providers. Consequently, the State of Hawaii (the "State") opposes, except with regards to a narrowly-crafted modification of the "affiliate" definition for CMRS providers, all of the petitions for reconsideration.

The plain language of Section 254(g) applies to all "providers of interexchange telecommunications services," including CMRS providers that offer interexchange services. The enactment of Section 254(g) did not merely incorporate the Commission's previous rate averaging and rate integration policies as applied to AT&T, but significantly expanded these policies as part of a national commitment to advance universal service.

None of the petitioners arguing for forbearance from rate integration describe how the public policy goal of universal service would be served by forbearance. There is no meaningful discussion as to how forbearance would protect consumers, or as to how they would ensure against unreasonably discriminatory rates and charges (including unreasonable regional discrimination). Indeed, forbearance from Section 254(g) would severely harm consumers. It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if forbearance from rate integration were granted.

Contrary to Bell Atlantic's assertion, Section 332(c) of the Communications Act did not totally deregulate CMRS service rates. Indeed, Section 332(c) expressly requires the Commission to continue to regulate CMRS providers pursuant to Sections 201, 202, and 208 of the Communications Act. Thus, CMRS service rates remain subject to federal oversight. The detariffing of CMRS services is not the same thing as rate deregulation.

PrimeCo advocates allowing CMRS providers to rate integrate only on a market-by-market basis and Bell Atlantic wants an exception for small CMRS carriers. The Commission has already rejected such exceptions in prior orders and the petitioners have provided no new evidence to change the Commission's prior conclusions on these issues. No special treatment is justified for CMRS providers. CMRS providers are quickly starting to look like large landline LECs with affiliated nationwide interexchange services.

In ruling that AMSC's mobile services are subject to Section 254(g), the Commission has already rejected the claim that CMRS carriers cannot distinguish between interexchange and local calling. Indeed, in its August 1996 Local Competition Order, the Commission determined that CMRS providers presently can distinguish between interexchange and local calls, albeit not in real time. Furthermore, as of April 1, 1998, cellular and broadband PCS carriers are required to have deployed the technology necessary to identify in real time the location of the initial cell site or base station used to originate an enhanced 911 ("E911") call from mobile handsets.

AirTouch states that it would accept a rate integration requirement that was limited to situations where the CMRS provider has chosen to itemize interexchange service as a separate charge on a customer's bill. AirTouch's proposal is unsatisfactory because CMRS providers would have the incentive (and ability) to mislabel or otherwise hide interexchange charges on customer bills in order to avoid rate integration requirements. If a CMRS provider charges extra for interexchange service, Section 254(g) requires that the interexchange charge be rate integrated, even if the charge is not labeled as such.

Classifying CMRS calls as "local" or "interexchange" based on Major Trading Areas ("MTAs") is arbitrary. MTAs are very large in size and do not correspond with the smaller licensed service territories of many CMRS providers, including cellular providers.

Although the Communications Act does not define the term "interexchange," the proper definition of "interexchange" is "telephone toll service." Obvious examples of interexchange CMRS calls are calls that utilize resold long-distance services and calls that "roam" between different CMRS networks. In order to help determine other types of interexchange CMRS calls, the Commission should immediately require CMRS providers to be more forthcoming in producing information on the technical aspects of their wireless networks.

The State is sensitive to the competition issues presented by the complex ownership structures of the CMRS industry. Therefore, a limited modification of the "affiliate" definition may be appropriate. The State would not object if "affiliation" in the CMRS context did not apply to: (1) multiple, competing parent companies that jointly control a CMRS provider; and (2) commonly-owned CMRS providers to the extent that they compete in the same geographic service area.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

OPPOSITION OF THE STATE OF HAWAII

INTRODUCTION

The State of Hawaii (the "State")[1] hereby opposes all of the petitions for reconsideration of the Commission's July 30, 1997 Reconsideration Order in the above-captioned proceeding (except with regards to a narrowly-crafted modification of the "affiliate" definition for CMRS providers). The Reconsideration Order reiterated that the rate integration requirement of Section 254(g) of the Communications Act applies to Commercial Mobile Radio Service ("CMRS") providers.[2] In their petitions,[3] which were filed on October 3, 1997, the seven

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[1] This opposition is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 96-61, FCC 97-269, at ¶ 18 (released July 30, 1997) ("Reconsideration Order").

[3] It should be noted that these petitions and the Commission's Reconsideration Order address only rate integration, the requirement that the same rate structure be used for both the mainland U.S. and so-called "offshore" points. The Commission has deferred reconsideration of geographic rate averaging issues until a later date.

CMRS interests[4] allege that: (1) the rate integration and geographic rate averaging requirements of Section 254(g) do not apply to CMRS services; (2) even if Section 254(g) does apply, the Commission should forbear from applying it to CMRS; (3) the technical configuration of CMRS services does not distinguish between local and interexchange calling, and thus integrating interexchange rates is impossible; and (4) requiring rate integration across affiliates would result in anticompetitive price fixing between competing CMRS providers.

This broad-based assault on Section 254(g) lacks validity. The plain language of Section 254(g) applies to all "providers of interexchange telecommunications services," including CMRS providers that offer interexchange services. The petitioners have not demonstrated how forbearance from Section 254(g) would protect consumers or prevent unreasonable discrimination against offshore points of the United States. With regard to distinguishing local from interexchange CMRS calls, the record demonstrates that CMRS carriers can easily make such distinctions now, and will in the near future be able to do so in real time. Lastly, with respect to rate integration across affiliates, the State recognizes that some limited modification of the definition of "affiliate" may be needed in the case of CMRS carriers competing in the same market. However, there are no valid grounds for granting a wholesale exemption from the affiliate requirement for all CMRS providers in all situations.

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[4] The seven parties filing petitions for reconsideration are all representatives of the CMRS industry: (1) AirTouch Communications; (2) Bell Atlantic Mobile; (3) BellSouth; (4) Cellular Telecommunications Industry Association ("CTIA"); (5) Personal Communications Industry Association ("PCIA"); (6) PrimeCo Personal Communications ("PrimeCo"); and (7) Telephone and Data Systems ("TDS").

I. SECTION ~~254~~(g) APPLIES TO ALL PROVIDERS OF INTEREXCHANGE SERVICES, INCLUDING CMRS PROVIDERS

Virtually all of the petitioners allege that Congress' enactment of Section 254(g) in 1996 merely codified the Commission's pre-existing rate integration policy. The petitioners allege that the Commission's pre-1996 policy applied only to landline interexchange carriers ("IXCs") and satellite common carriers and that, therefore, Congress did not intend Section 254(g) to apply to CMRS.[5]

This argument is nothing new and the Commission has expressly rejected it. As the Commission has recognized, of primary importance is the fact that the express language of Section 254(g) applies to all "'providers of interexchange telecommunications services' with no exceptions enumerated."[6] If Congress had intended to exclude CMRS providers from Section 254(g), it would have clearly done so. Many other provisions of the Telecommunications Act of 1996 expressly exempt CMRS services.[7] One cannot credibly argue that Section 254(g),

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[5] See, e.g., Petition of PrimeCo at 3, 18-20; Petition of CTIA at 2-3; Petition of AirTouch at 2-7; Petition of TDS at 3-4; Petition of Bell Atlantic at 7-8.

[6] Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order, CC Docket No. 96-61, FCC 97-357, at ¶ 19 (released Oct. 3, 1997) ("Stay Order").

[7] For example, CMRS services are expressly excluded from the 1996 Act's definition of "local exchange carrier." 47 U.S.C. § 153(26). In addition, interLATA CMRS services were expressly classified as one of the "incidental interLATA services" which the Bell companies ("BOCs") could offer without prior Commission approval. 47 U.S.C. § 271(g)(3). Similarly, CMRS services were expressly excluded from the definition of "basic telephone service" in Section 274, thus permitting the BOCs to immediately offer electronic publishing over their CMRS networks. 47 U.S.C. § 274(i)(2)(B). As a last example, the BOCs were expressly permitted to jointly market and sell CMRS services in conjunction with other services, in contrast to the Section 271(e)(1) prohibition against them jointly marketing wireline services. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, sec. 601(d) (1996).

which has no such exemption, nonetheless silently exempts CMRS services from its rate integration requirements.

CMRS providers were, in fact, subject to rate integration requirements articulated by the Commission prior to the enactment of the 1996 Act.[8] In any event, the enactment of Section 254(g) did not merely incorporate the Commission's previous rate averaging and rate integration policies as applied to AT&T, but significantly expanded these policies as part of a national commitment to advance universal service. Just as Section 254 expanded universal service to include, for the first time, advanced telecommunications services for schools, libraries, and rural health care providers,[9] so too did Section 254(g) expand the universal service concepts of rate averaging and rate integration to all interexchange carriers and all interexchange services. The Commission has repeatedly recognized the expansive nature of Section 254(g).[10]

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[8] The fact that the Commission may not have passed upon the violations of rate integration principles by CMRS carriers in the past cannot be used as justification for CMRS carriers to breach these principles now.

[9] See, e.g., 47 U.S.C. §§ 254(b)(2), 254(b)(6), 254(h)(2).

[10] For example, under the pre-Section 254(g) regime, AT&T had been allowed to offer promotions lasting longer than 90 days. Under the Section 254(g) regime, in contrast, the Commission determined that a maximum promotion term of 90 days "best implements the statutory mandate for geographic averaging." Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 FCC Rcd 9564, 9578 (1996) (emphasis added) ("First Report and Order"). The Commission also noted that "the 1996 Act extends rate integration to U.S. territories and possessions, including Guam and the Northern Marianas, because rate integration obligations apply to providers of interexchange services between 'states.'" Id. at 9589 (emphasis added).

Right from the beginning of CC Docket 96-61, the Commission recognized that Section 254(g) applied to interexchange CMRS. Consistent with the plain meaning of the statute, the Commission's Notice of Proposed Rulemaking stated that an interexchange call:

> includes all means of connecting point A and point B -- wireline or wireless -- and all network paths between those points. In the future, cellular, PCS, or other wireless interexchange services may provide an effective substitute for interexchange wireline service.[11]

In both the First Report and Order and the Reconsideration Order, the Commission also rejected AMSC's claim that Section 254(g) applied only to landline carriers, stating that AMSC's CMRS services "would appear to fall within the definition of interstate interexchange telecommunications services subject to Section 254(g)."[12]

Even some of the CMRS petitioners have made concessions regarding the applicability of Section 254(g) to CMRS. For example, CTIA does not contest the fact that Section 254(g) applies to CMRS satellite carriers such as AMSC.[13] CTIA also states that if Section 254(g) applies to terrestrial CMRS services, CMRS carriers should not be required to cross-integrate their interexchange CMRS services with any other type of interexchange service

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[11] Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7169 n.118 (1996) ("NPRM") (emphasis added). See also Stay Order at ¶ 19 & n.58.

[12] First Report and Order, 11 FCC Rcd at 9589; Reconsideration Order at ¶ 24. See also Stay Order at ¶ 19 & n.60.

[13] CTIA Petition at 8 n.11.

(e.g., landline).[14] PrimeCo states that it could accept a rule prohibiting CMRS providers from imposing a special rate category for calls to offshore points.[15] Furthermore, AirTouch states that it could live with a rate integration requirement if it was limited to situations where the CMRS provider has chosen to itemize long-distance service as a discrete, separate charge on a customer's bill.[16]

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[14] BellSouth states that if CMRS services are required to be rate integrated, cellular and PCS services should be integrated separately. BellSouth Petition at 24. Such separation is not warranted because cellular and PCS are similar, substitutable services. As the BOCs (including BellSouth) have conceded, cellular and PCS "offer similar features and functionalities to customers, compete on the basis of price, quality and services, and . . . the only fundamental difference between the two services is the frequency band on which they operate." Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, at ¶ 19 & n.62 (rel. Oct. 3, 1997). Also supporting the joint integration of cellular and PCS rates is the fact that PCS providers are beginning to offer both PCS and cellular service over the same mobile handset. See Mike Mills, "AT&T Joins Wireless Phone Fight", Washington Post, Oct. 15, 1997, at C13 (AT&T's PCS service uses "a phone that works in either digital or traditional 'analog' mode, and also operates at each of the two radio frequencies used by older and new cellular systems."); see also "AMPS Rides Again as PCS Carriers Turn to Analog Roaming to Increase Coverage", PCS WEEK (Oct. 22, 1997).

[15] PrimeCo Petition at 14.

[16] AirTouch Petition at 6, 17. Earlier in Docket 96-61, U S WEST, a controlling partner in PrimeCo, asked the Commission in September 1996 to clarify that it need not cross-integrate the interexchange rates of U S WEST Media Group, its CMRS subsidiary, with the interexchange rates of U S WEST Communications Group, its landline telephone subsidiary. See U S WEST, Inc.'s Petition for Clarification, or, in the Alternative, Reconsideration, at 4-6 (filed Sep. 16, 1996). At that time, U S WEST expressly acknowledged that rate integration applied to all affiliates within each "targeted stock" subsidiary, including its CMRS subsidiary. See id. at 5-6 ("[I]ndividually U S WEST Communications Group and U S WEST Media Group are, of course, subject to rate integration.") (emphasis added).

The Commission has correctly concluded that Congress intended to apply Section 254(g) to all interexchange carriers, including CMRS providers. The petitions should, therefore, be denied.[17]

II. CMRS CARRIERS ARE INTEREXCHANGE CARRIERS IF THEY PROVIDE INTEREXCHANGE SERVICES

AirTouch claims that the Commission, in its 1984 access charge proceeding, determined that a cellular carrier was not an interexchange carrier subject to the imposition of access charges.[18] What AirTouch fails to mention is that the Commission determined in 1986 that a cellular carrier would constitute an interexchange carrier if it provided interstate, interexchange service. The Commission noted that many cellular carriers offered their customers "roaming" capability across state lines and that such services did constitute interexchange service:

> [S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the

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[17] Bell Atlantic Mobile, BellSouth, and PrimeCo all argue that the Commission did not provide adequate notice that it intended to subject CMRS carriers to the rate integration requirements of Section 254(g). The issue of notice was fully briefed during consideration of PrimeCo's motion for stay, and the State incorporates its comments on the notice issue by reference. See Opposition of the State of Hawaii to PrimeCo's Motion for Stay, at 3-6 (filed Sep. 29, 1997). In its Stay Order, the Commission expressly ruled that adequate notice had been given. See Stay Order at ¶ 19. In any event, the issue of notice has been rendered de facto moot because the Commission is now considering the CMRS issue directly through its review of these petitions for reconsideration.

[18] AirTouch Petition at 8 (citing MTS/WATS Market Structure, 97 FCC.2d 834, 881-83 (1984)).

> cellular carrier is providing not local exchange service but interstate, interexchange service.[19]

Thus, contrary to AirTouch's assertion, the Commission has explicitly determined that cellular carriers are interexchange carriers when they provide interexchange service. The Commission has most recently reiterated this long-standing determination in its October 3, 1997 Stay Order when it declared: "[W]e decline to stay enforcement of our requirement that CMRS carriers provide interstate interexchange services on an integrated basis."[20]

Curiously, AirTouch also argues that CMRS carriers are not considered interexchange carriers because the Commission did not mention them in its August 1997 reconsideration order detariffing landline interexchange carriers.[21] The reason the Commission did not mention CMRS services had nothing to do with the classification of CMRS carriers as interexchange carriers; CMRS services were not mentioned simply because they had already been detariffed, cellular services since their inception[22] and all CMRS services since 1994.[23]

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[19] The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P&F) 1275 at Appendix B n.3 (1986) (emphasis added).

[20] Stay Order at ¶ 14. See also Reconsideration Order at ¶ 18 ("Although CMRS is primarily a telephone exchange and exchange access service, many CMRS providers also offer interstate interexchange service as well. An interstate interexchange CMRS call enables a customer to place a long-distance call to an exchange in a different state.").

[21] AirTouch Petition at 8.

[22] See, e.g., Bundling of Cellular Customer Premises Equipment and Cellular Service, Notice of Proposed Rulemaking, 6 FCC Rcd 1732, 1734 (1991) ("[A]t the federal level cellular service has been detariffed from the start.").

[23] Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1478-80 (1994) ("CMRS Second Report and Order").

III. THE PETITIONERS HAVE PROVIDED NO GROUNDS FOR THE COMMISSION TO FORBEAR FROM APPLYING SECTION 254(g) TO CMRS PROVIDERS

Many petitioners argue that even if Section 254(g) does apply to CMRS providers, the Commission should forbear from applying it to CMRS because the CMRS marketplace is competitive.[24] Again, this argument is nothing new and the Commission has expressly rejected it. As the State noted in May 1996, competition is only one of several considerations under Section 10's forbearance test, and in no case can broad claims about promoting competition alone justify forbearance in these circumstances.[25] According to Section 10 of the 1996 Act, the Commission must find for specific services and markets that forbearance (1) will not jeopardize the reasonableness and nondiscriminatory nature of carriers' rates and practices; (2) will not undermine consumer protection; and (3) is otherwise in the public interest.[26] Competitive considerations are relevant to the third factor only.[27] Universal service considerations are relevant to the first two factors.

None of the petitioners arguing for forbearance from rate integration address the criteria under Section 10 or develop a sufficient factual predicate for forbearance. Nor do the petitioners' describe how the public policy goal of universal service would be served by forbearance. There is also no meaningful discussion as to how forbearance would protect consumers, or as to how they would ensure against unreasonably discriminatory rates and

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[24] See Bell Atlantic Mobile Petition at 15-20; CTIA Petition at 8-11; PCIA Petition at 4-7; PrimeCo Petition at 21-25; TDS Petition at 4-5.

[25] Reply Comments of the State of Hawaii at 3, CC Docket No. 96-61 (filed May 3, 1996).

[26] 47 U.S.C. § 160(a).

[27] 47 U.S.C. § 160(b).

charges (including unreasonable regional discrimination). Indeed, forbearance from Section 254(g) would severely harm consumers. CMRS services are becoming real substitutes for such interexchange services and bring critically needed competition to offshore consumers.[28] It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if forbearance from rate integration were granted.[29] Such unreasonable discrimination would violate Section 202(a) of the Communications Act and is precisely what Section 254(g) was enacted to prevent.[30]

A. Forbearance Cannot Be Justified on Competitive Considerations Alone

In enacting Section 254(g), Congress was not ignorant of the state of competition in the interexchange market. Prior to the enactment of the 1996 Act, the Commission had already determined that all IXCs were non-dominant in the domestic market. In October 1995, the Commission declared AT&T non-dominant because it found that "most major segments of the interexchange market are subject to substantial competition today, and the vast majority of

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[28] See NPRM, 11 FCC Rcd at 7169 n.118.

[29] See Opposition of the State of Hawaii to PrimeCo's Motion for Stay, at 9 (filed Sep. 29, 1997).

[30] Section 202(a) prohibits unreasonable discrimination based on a customer's location. Rate integration is a necessary corollary of Section 202(a) because it ensures against location-specific discrimination in the methodology of calculating prices. As the Commission has noted, "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or unreasonable rate discriminations, as expressed in Section 202(a)." Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Notice of Proposed Rulemaking, 1985 FCC LEXIS 2532 at ¶ 10 (1985); see also MTS and WATS Market Structure, 81 FCC.2d 177, 192 (1980).

interexchange services and transactions are subject to substantial competition."[31] Yet, Congress codified and expanded geographic rate averaging and rate integration in the 1996 Act. Moreover, it did so in the provision concerning universal service because it realized that competition, by bringing rates closer to cost, could make rate disparities between geographic regions worse. The very purpose of geographic rate averaging and rate integration is to promote universal service by, if necessary, subsidizing the high costs of providing telephone service in rural and other high-cost areas with revenues from low-cost areas. Congress enacted Section 254(g) specifically to protect consumers in high-cost areas from such rate disparities.

The Commission has repeatedly rejected attempts by IXCs to avoid the rate integration requirements of Section 254(g) through Commission forbearance. In its First Report and Order, the Commission expressly did not forbear from the rate integration principle for any service.[32] Specifically, the Commission stated that:

> We are not persuaded that we must forbear from requiring carriers to comply with rate integration, either generally or in competitive conditions, for the same reasons discussed with respect to geographic rate averaging. Our rate integration policy has integrated offshore points into the domestic interstate interexchange rate structure so that the benefits of growing competition for interstate interexchange services . . . are available throughout the nation.[33]

The Commission reached the same conclusion in its January 1997 order rejecting AT&T's petition for waiver of Section 254(g), ruling that any increased regional competition that

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[31] Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3288 (1995).

[32] First Report and Order, 11 FCC Rcd at 9588-89.

[33] Id. at 9588 (emphasis added); see also id. at 9597 ("[W]e do not view rate integration as inconsistent with flexibility and competitive responses by carriers.").

forbearance would promote does not "outweigh the benefits of the national policy of geographic averaging embodied in section 254(g) of the Act and our implementing regulations."[34] Again, in its July 1997 Reconsideration Order, the Commission denied IT&E's request for forbearance from rate integration, stating that:

> IT&E has not shown that its rates to subscribers would be reasonable and nondiscriminatory, absent application of section 254(g). Nor has IT&E shown that application of section 254(g) is not necessary to protect consumers from discriminatory rates, or that it would be in the public interest, or that it would promote competition.[35]

If anything, certain CMRS services, such as cellular service, function in a less competitive marketplace than landline interexchange services. Whereas the Commission has declared all landline IXCs nondominant, the Commission continues to classify facilities-based cellular carriers as dominant because spectrum constraints permit only two cellular carriers per service area.[36] In 1994, the Commission concluded that "the record on the degree of competition is less clear for cellular service than for the other services in the CMRS marketplace."[37]

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[34] AT&T's Corp.'s Petition for Waiver and Request for Expedited Consideration, 12 FCC Rcd 934, 939 (1997).

[35] Reconsideration Order at ¶ 33.

[36] CMRS Second Report and Order, 9 FCC Rcd at 1416 & n.22.

[37] Id. at 1470.

B. Market-By-Market Rate Integration Does Not Satisfy the Requirements of Section 254(g)

PrimeCo claims that CMRS carriers are required to integrate rates only on a market-by-market origination basis.[38] In its Reconsideration Order, the Commission expressly rejected a market-by-market integrated rate structure suggested by AMSC, a CMRS provider:

> We are also not persuaded by the argument that it is permissible under section 254(g) to charge mobile service subscribers that originate calls while located in a state or an offshore region higher rates than calls originated in another state or offshore region, as long as all subscribers that originate calls in that state or region are assessed those rates. Applied most broadly, AMSC's interpretation of Section 254(g) would eviscerate the rate integration provisions of that section by permitting carriers to charge customers in different states different rates as long as it charged all customers within that state the same rate. The specific language of section 254(g) requires, however, that subscribers be charged rates no higher than subscribers in different states, not within a state.[39]

C. The Enactment of Section 332(c) of the Communications Act Has No Bearing on the Authority of the Commission to Integrate CMRS Rate Structures Under Section 254(g)

Bell Atlantic argues that rate integration constitutes a form of rate regulation which Congress and the Commission have decided not to apply to CMRS providers.[40] Bell

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[38] PrimeCo Petition at 14.

[39] Reconsideration Order at ¶ 25. Similarly, the Commission has rejected AT&T's attempt to charge a different rate structure in certain "corridor" markets and IT&E's plan to discriminate based on the terminating location of an interexchange call. See AT&T's Corp.'s Petition for Waiver and Request for Expedited Consideration, 12 FCC Rcd 934, 939 (1997); Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, DA No. 97-1628, at ¶ 19 (released Jul. 30, 1997).

[40] Bell Atlantic Mobile Petition at 9-11.

Atlantic notes that Congress passed legislation in 1993 granting the Commission authority to forbear from applying Title II common carrier regulation to CMRS providers and preempting all state and local rate regulation of CMRS services.[41]

Bell Atlantic misinterprets the Congressional intent behind enacting Section 332(c) of the Communications Act. As the Commission stated in 1994, the primary intent of Congress was, consistent with the public interest, to accord similar regulatory treatment to similar services.[42] Furthermore, Congress expressly required the Commission to continue to regulate CMRS providers pursuant to Sections 201 (just and reasonable rates, interconnection obligations), 202 (unreasonable rate discrimination prohibited), and 208 (enforcement of violations through the complaint process) of the Communications Act.[43] Thus, CMRS service rates remain subject to federal oversight.[44] Although the Commission was given the authority to forbear from other regulations of Title II, it could do so only if it determined that such regulations were not needed to: (1) prevent unreasonably discriminatory rates; and (2) protect consumers.[45] Even though the Commission detariffed CMRS services in 1994, the Commission

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[41] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993) (amending Section 332(c) of the Communications Act).

[42] CMRS Second Report and Order, 9 FCC Rcd at 1418 & n.29 (citing H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993)).

[43] 47 U.S.C. § 332(c)(1)(A).

[44] The fact that Section 332(c) preempts states from regulating the retail rates of intrastate CMRS services has no bearing on the Commission's authority -- mandated by Section 254(g) -- to integrate the rates of interstate CMRS services.

[45] 47 U.S.C. § 332(c)(1)(A).

emphasized that the rates of CMRS carriers remain subject to federal oversight and that enforcement action would be taken if CMRS rates were unreasonable or discriminatory:

> [T]he continued applicability of Sections 201, 202, and 208 will provide an important protection in the event there is a market failure. . . . In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.[46]

Similarly, Section 10 of the Communications Act permits the Commission to forbear only if the forbearance does not threaten "just and reasonable" rates or risk "unreasonably discriminatory" rates.[47]

Thus, contrary to Bell Atlantic's assertion, CMRS rates have never been totally deregulated. Detariffing is not the same thing as rate deregulation. The Commission cannot, pursuant to Section 332(c) or Section 10 of the Communications act, forbear from applying rate integration to CMRS services because forbearance would allow CMRS carriers to unreasonably discriminate against offshore points, in violation of Section 202(a) of the Communications Act.

D. The Fact That Some CMRS Carriers Are Smaller or New Entrants Does Not Justify Forbearance

Bell Atlantic claims that a rate integration requirement would discourage small and/or new CMRS entrants from building out competitive networks, especially in rural markets.[48] This claim is unsupported, based on pure speculation, and involves the same "small

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[46] CMRS Second Report and Order, 9 FCC Rcd at 1478-79.

[47] 47 U.S.C. § 160(a)(1).

[48] Bell Atlantic Mobile Petition at 13-14.

carrier" argument ~~that~~ has already been considered and rejected by the Commission. In the First Report and Order, the Commission ruled:

> We are also not persuaded that we should forbear from applying rate integration to smaller carriers serving high-cost areas on the grounds that they might have difficulty competing against nationwide carriers. These carriers have provided only conclusory allegations of harm and have not shown that they will be unable to compete with larger carriers in a rate-integrated environment, much less that they have satisfied all three of the requirements set forth in Section 10 for exercise of our forbearance authority.[49]

This analysis applies to both landline and wireless small carriers, and Bell Atlantic Mobile has provided no new evidence to change the Commission's prior conclusions on this issue.

The pleas by CMRS providers for special treatment are suspect. CMRS services are increasingly not small and are offering nationwide services.[50] In addition, CMRS providers are now using their radio frequencies for fixed wireless services.[51] Thus, CMRS providers are quickly starting to look like large landline LECs with affiliated nationwide interexchange services. Bell Atlantic's proposal to exclude new wireless entrants from the rate integration

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[49] First Report and Order, 11 FCC Rcd at 9589; see also Reconsideration Order at ¶ 33.

[50] See, e.g., Mike Mills, "AT&T Joins Wireless Phone Fight", Washington Post, Oct. 15, 1997, at C13 ("What makes AT&T's service stand apart is that users can 'roam' practically anywhere nationwide"); Rebecca Cantwell, "Sprint Unveils Dual Band Digital, Cellular Phones", Rocky Mountain News, Oct. 15, 1997, at Ed. F, Pg. 2B ("Sprint officials say customers using the new phones will be able to automatically 'roam' in more than 75 percent of the cellular coverage area in the United States and make calls using credit cards elsewhere.").

[51] See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, FCC 97-352, at ¶ 36 (rel. Oct. 3, 1997) ("We believe that in the wake of the development of fixed wireless services, incumbent LECs and CMRS operators are increasingly likely to be direct competitors.").

requirements of ~~Seetion~~ 254(g) is not based on credible premises and should, therefore, be rejected.

IV. DISTINGUISHING BETWEEN INTEREXCHANGE AND LOCAL CALLS IN THE CMRS CONTEXT

The CMRS petitioners next attempt to avoid rate integration on technical grounds. Specifically, they argue that it is technically impossible to determine which CMRS calls are interexchange and which are local.[52] This argument has been proffered by AMSC continuously since April 1996[53] and the Commission has repeatedly rejected it.[54]

In ruling that AMSC's mobile services are subject to Section 254(g), the Commission has already rejected the claim that CMRS carriers cannot distinguish between interexchange and local calling. CTIA does not support reconsideration of the Commission's decision to apply rate integration to AMSC, presumably because it knows that AMSC can distinguish the jurisdictional nature of its customers' mobile calls.[55] If AMSC can make such distinctions, so can other members of the CMRS industry. The CMRS petitioners provide absolutely no support for their assertion of technical infeasibility. Until they do, the Commission should reject their assertion as groundless.

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[52] CTIA Petition at 4; AirTouch Petition at 12.

[53] Comments of AMSC Subsidiary Corporation at 3 (filed Apr. 19, 1996) ("AMSC typically cannot tell whether customers are using its system for interexchange or local service."); Reconsideration Order at ¶ 22 ("AMSC contends that the design of its satellite system prevents AMSC from distinguishing local and international traffic from interstate traffic.").

[54] First Report and Order, 11 FCC Rcd at 9589; Reconsideration Order at ¶ 24.

[55] See supra n.13 and accompanying text.

Indeed, CTIA fails to mention that this issue of technical feasibility arose in the context of the Local Competition Order's discussion of mutual compensation between CMRS and landline systems. In that August 1996 order, the Commission determined that CMRS providers presently can distinguish between interexchange and local calls, albeit not in real time. In particular, the Commission decided that a CMRS call would be classified as "local" or "interstate" based on either: (1) the location of the initial cell site when a call begins; or (2) the point of interconnection between the LEC and CMRS systems at the beginning of the call.[56]

CMRS customers are billed on a monthly basis. There is, consequently, no need to determine the classification of a CMRS call in real time. CMRS carriers have plenty of time prior to billing to make such classifications and, therefore, should integrate their CMRS interexchange rates as required by Section 254(g). Furthermore, as of April 1, 1998, cellular and broadband PCS carriers are required to have deployed the technology necessary to identify in real time the location of the initial cell site or base station used to originate an enhanced 911 ("E911") call from mobile handsets.[57] In conclusion, the technology exists now to identify in a timely fashion the jurisdictional nature of CMRS calls and, within the next six months, technology will be deployed that makes such identifications in real time. The Commission should, therefore, reject the claims of technical infeasibility alleged by the CMRS petitioners and order them to integrate interexchange CMRS rates, as required by Section 254(g).

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[56] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16017 (1996) ("Local Competition Order").

[57] 47 C.F.R. § 20.18(d); Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18682-84, 18707-18 (1996).

V. ALL INTEREXCHANGE CMRS CALLS WITH A SEPARATE CHARGE FOR INTEREXCHANGE SERVICE -- HOWEVER THE EXTRA CHARGE MAY BE LABELLED -- MUST BE RATE INTEGRATED PURSUANT TO SECTION 254(g)

AirTouch argues that even if differentiating interexchange and local calls is technically possible, many carriers offer wide-area calling plans that charge a uniform rate regardless of whether the call is interexchange or local. Consequently, AirTouch argues that integration of interexchange "rates" has no meaning in such a context.[58] The State favors wide-area calling plans that offer distance-insensitive charges because they promote the public policy of universal service and non-discrimination. Such plans are similar to extended area service ("EAS") in the landline concept, which have often been beneficial to local ratepayers.[59] However, the CMRS petitioners concede that many so-called "wide-area calling plans" do not, in fact, provide uniform, distance-insensitive charges.[60] Rather, many such calling plans charge for interexchange service separately. For such calling plans, Section 254(g) requires that the interexchange charge be rate integrated.

AirTouch states that it would accept a rate integration requirement that was limited to situations where the CMRS provider has chosen to itemize interexchange service as a separate

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[58] AirTouch Petition at 11; see also Bell Atlantic Mobile Petition at 17 n.21.

[59] A caveat is in order. At some point, if the EAS area became large enough, one could have postalized long distance rates for the mainland U.S. or a major portion thereof. Were the State of Hawaii excluded from such a postalized rate structure, then the fundamental nondiscrimination concerns that gave rise to the rate integration policy would be triggered.

[60] See PrimeCo Petition at 12-13 ("[A] carrier which provides wide-area local calling plans in some markets may assess a separate toll charge in other markets."); CTIA Petition at 7.

charge on a customer's bill.[61] AirTouch's proposal is unsatisfactory because CMRS providers would have the incentive (and ability) to mislabel or otherwise hide interexchange charges on customer bills in order to avoid rate integration requirements. As AirTouch itself points out, CMRS providers often recover interexchange costs indirectly through monthly access fees, per-minute rates, or packages of minutes.[62] It should not matter whether the interexchange charge is expressly labeled "interexchange" on a customer's bill, or is assessed indirectly through higher access fees or through higher per-minute airtime rates. If a CMRS provider charges extra for interexchange service, Section 254(g) requires that the interexchange charge -- however it may be labeled -- be rate integrated.[63]

The most obvious example of a discrete interexchange charge is a roaming charge. As discussed above (pp. 7-8 & n.19), in 1986 the Commission expressly determined that roaming charges were interexchange charges. Thus, pursuant to Section 254(g), roaming charges must be rate integrated. PrimeCo's statement that the Commission has never required CMRS providers to integrate their roaming charges[64] is irrelevant: Section 254(g) mandates that all interexchange rates be integrated, regardless of whether the Commission enforced this requirement in the past.

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[61] AirTouch Petition at 6, 17.

[62] Id. at 12.

[63] To the extent that an interexchange charge is hidden within a "local" airtime charge, that portion of the airtime charge must be rate integrated. AirTouch's claim that the State has agreed that toll services and airtime are different services that need not be cross-integrated is a misstatement of the State's position. AirTouch Petition at 13. The State considers toll and airtime to be components of a single, CMRS service.

[64] PrimeCo Petition at 12 n.42.

VI. SECTION 254(g) REQUIRES THAT ALL INTEREXCHANGE CMRS CALLS BE RATE INTEGRATED, REGARDLESS OF WHETHER THEY ORIGINATE AND TERMINATE WITHIN A SINGLE MAJOR TRADING AREA

A. Classifying CMRS Calls as "Local" or "Interexchange" Based on MTAs Is Arbitrary and Does Not Comport With the Definition of "Telephone Toll Service" in the Communications Act

CTIA asserts that all CMRS calls within a Major Trading Area ("MTA") are local calls, not interexchange, and are thus not subject to Section 254(g), even though many of these calls are interstate and likely travel across multiple CMRS and landline networks.[65] CTIA notes that the Commission utilizes MTAs to define a CMRS provider's local service area for purposes of paying reciprocal compensation rates to a LEC (as opposed to paying access charges).[66]

This analogy is inadequate. Reciprocal compensation is based on Section 251(b)(5) of the 1996 Act, which says nothing about interexchange services. In the absence of express statutory language, it is within the Commission's reasoned discretion to determine the service area within which CMRS calls qualify for reciprocal compensation. In contrast, Section 254(g) expressly directs the Commission to integrate the rates of all "interstate interexchange telecommunications services." Although the Communications Act does not define the term "interexchange," the proper definition of "interexchange" is "telephone toll service," which is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[67] This

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[65] CTIA Petition at 3.

[66] See Local Competition Order, 11 FCC Rcd at 16014.

[67] 47 U.S.C. § 153(48) (emphasis added).

definition of "interexchange" fits nicely in the CMRS context because, as the State argues above, the rate integration requirement of Section 254(g) should apply to those CMRS calling plans that possess a toll service charge (direct or hidden) separate from local airtime. In conclusion, Section 254(g) requires the Commission to reject CTIA's assertion that all intra-MTA calls are automatically "local" calls.

B. The CMRS Industry Should Be More Forthcoming in Providing the Commission With Network Information That Would Help Determine Which CMRS Calls Are "Interexchange"

Although it is clear that the Communication Act's definition of "telephone toll service" should be used to classify which CMRS calls are "interexchange," determining what, in the CMRS context, constitutes "a call between stations in different exchange areas" is not as clear. Nevertheless, one obvious example of interexchange calling is a CMRS call that utilizes resold long-distance services from landline carriers. Many, if not most, long-distance CMRS calls are completed using landline facilities of another carrier or of the CMRS provider itself. Because there is no ambiguity regarding the "interexchange" or "local" nature of landline facilities, CMRS calls could be classified in accordance with the classification of the underlying resold landline facility.[68] Another obvious example of interexchange calling is a CMRS call that "roams" between the CMRS systems of two different CMRS providers. Yet another possible type of interexchange calling could be a CMRS call between two mobile telephone switching offices ("MTSOs"), or between an MTSO and a landline LEC facility, that are located in different licensed service territories. Rate integration would be required for all such calls,

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[68] AirTouch concedes that when CMRS providers utilize resold long-distance services, customer bills often reflect separate charges for toll service and local airtime. AirTouch Petition at 9-10.

provided that they ~~were~~ interstate and the CMRS provider assessed a separate charge for the interexchange portion of the call.

The State submits that this is an issue that warrants more analysis. The problem with using MTAs as the dividing line between "local" and "interexchange" calls is that MTAs are very large in size. Classifying as "local" all calls in such a large area would severely undercut the effectiveness of the rate integration requirement and its underlying universal service purpose. MTAs are also arbitrary because they do not correspond with the smaller licensed service territories of many CMRS providers, including cellular providers. CMRS providers are, of course, most familiar with their wireless networks and their billing arrangements. CMRS providers also know the interrelationship between their MTSOs, and between landline LEC facilities and their MTSOs. The Commission should require CMRS providers to be more forthcoming in producing information on the technical aspects of their wireless networks.

VII. SECTION 254(g) REQUIRES RATE INTEGRATION ACROSS CMRS AFFILIATES, EXCEPT IN CERTAIN LIMITED SITUATIONS

The petitioners argue that CMRS providers often operate through complex partnership structures in which many independent entities hold ownership interests.[69] The result is that CMRS companies that are partners in one market may be competitors in other markets. Under the Commission's current definition of "affiliate,"[70] these CMRS companies

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[69] AirTouch Petition at 14; PrimeCo Petition at 15; PCIA Petition at 9; Bell Atlantic Petition at 14-15.

[70] 47 U.S.C. § 32.9000.

would be required to integrate their rates even in markets where they were competing against each other.

The State is sensitive to the competition issues presented by the complex ownership structures of the CMRS industry. Therefore, a limited modification of the "affiliate" definition may be appropriate. AirTouch states that it would accept rate integration across CMRS affiliates provided that only entities which: (1) are identically owned by a single carrier; and (2) serve separate geographic areas, would be considered "affiliated" and thus required to integrate their interexchange rates.[71] AirTouch's proposal, although a start, restricts the definition of "affiliate" beyond what is necessary to preserve competition.

The State agrees with AirTouch that "affiliation" should not apply to: (1) multiple, competing parent companies that jointly control a CMRS provider; and (2) commonly-owned CMRS providers to the extent that they compete in the same geographic service area. However, AirTouch provides no justification for limiting affiliation to CMRS providers that are "identically owned by a single provider." If one CMRS provider is owned 94 percent by Company X and another CMRS provider is owned 85 percent by Company X, these two CMRS providers should be considered affiliates because they are commonly controlled by the same parent company. The important issue is control, not whether the control is based on "identical" ownership interests or on ownership by a "single" company.

While the State would not object to a limited modification of the "affiliate" definition (as outlined above), the Commission should reaffirm that Section 254(g) requires rate integration across affiliates for all interexchange carriers, including CMRS carriers. To rule

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[71] AirTouch Petition at 15-16.

otherwise would ~~allow~~ companies "to avoid the Congressional mandate of integrated interexchange rates by using or creating multiple interexchange carrier subsidiaries, each serving a separate geographic area."[72]

CONCLUSION

For the aforementioned reasons, the State respectfully requests that all of the petitions for reconsideration be DENIED. The State would not, however, object to two limited exceptions. First, rate integration need not be attempted in the case of truly distance-insensitive wide-area calling plans (i.e., plans without any separate charge -- express or hidden -- for interexchange service). Second, a limited modification of the Commission's "affiliate" definition -- as outlined in Part VII above -- may be appropriate to accommodate the complex ownership structure in the CMRS industry.

Respectfully submitted,

THE STATE OF HAWAII

By: James M. Fink

Herbert E. Marks
James M. Fink

Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Its Attorneys

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Kathryn Matayoshi,
Director

Charles W. Totto,
Executive Director
Division of Consumer Advocacy
DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
250 South King Street
Honolulu, Hawaii 96813
(808) 586-2770
STATE OF HAWAII

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[72] Reconsideration Order at ¶ 15.